

MEMO

FROM: Allen Merritt

DATE: Friday, July 05, 2013

TO: Tim Luke, Carter Fritchle, Garrick Baxter, Gary Spackman
Copy to Kevin Lakey

SUBJECT: Complaint of non-delivery of decreed water rights below Magic Reservoir
Need for Futile Call determination by the Director

On 7/3/13 I received a phone message from Nick Westendorf (490-0997). Mr. Westendorf indicated that he had recent discussions with Kevin Lakey (watermaster for WD37). Mr. Lakey had indicated to him that there is presently 120 cfs flowing into Magic Reservoir and normally if the Big Wood Canal Co (BWCC) was delivering storage Mr. Lakey would be able to deliver 1896 priority decrees from the Big Wood River below Magic; however since Magic essentially has drained the BWCC has shut the gates and no water is presently flowing below the dam. Mr. Westendorf indicated that he had 1884 decrees and wanted to know if anything could be done to deliver his water.

I called Mr. Lakey prior to calling Mr. Westendorf. Mr. Lakey confirmed his conversation with Mr. Westendorf and indicated that in past years when Magic shuts off the BWCC (maybe AFRD#2) has provided extra water to the decree holders through some sort of exchange with Snake River water but this year they are short and Lynn Harmon (manager of BWCC and AFRD#2) could not do that. Mr. Lakey indicated that he understood the call for delivery may be futile but is open for further determination. He indicated that Mr. Harmon has indicated he has a record of decree showing it is futile and was going to research his records and provide a copy to Mr. Lakey.

I called Mr. Westendorf and he indicated that he presently is being delivered 96 inches of American Falls Supplemental water but his Big Wood decreed right 37-619B has been shut off and he wanted to know if there was anything that could be done. He indicated he understood there was an old court case that required the BWCC to deliver the water and in the past they were provided water. He indicated there were several decree holders in his area that were interested in this and would appreciate IDWR look into this matter. I told him that I would look into it but explained that their call on water may be futile.

Before leaving work I received a message from Mike Sabala with Sabala Farms Inc. He called to support the request of Mr. Westendorf indicating his family had Big Wood rights not being delivered and requested IDWR look into it. Mr. Sabala indicated I need not call him. I have researched the rights and I'm not sure which rights Mr. Sabala refers but 37-72B may be one and 37-581 another that are associated with the Sabala name.

I have looked in our old decree records and find that the "Arkoosh vs Big Wood Canal Co" may be the court case that people are referencing. This case made its way to the Supreme Court around 1930 but I find it sort of confusing. It appears to assign a conveyance loss assessment to the decree holders below Magic with the BWCC to make up everything else but I'm not sure it fits the present

day situation. This needs to be reviewed by legal staff. (If needed I can scan what copies we have if one is needed.) I find it interesting that they assign a “normal” loss of 54 cfs in the first section (Magic Dam down to Gooding Canal) and 6.6 cfs in the second section (North Gooding Canal to around Gooding). These descriptions are somewhat confusing in the present day distribution system and not sure of what was meant since things may have changed. See Attached Map. Also in the Findings of Fact there is an indication that the loss in the first section is as high as 213 cfs and in the second section as high as 132 cfs. This would support a determination of a futile call.

With regards the decrees of the parties that have called they have a condition:

Delivery of this right is subject to the water exchange provisions contained in Bureau of Reclamation contract no. 14-06-W-73, executed October 14, 1954, between the United States of America and American Falls Reservoir District No. 2, as supplemented by Bureau of Reclamation contract no. 14-06-100-6031, executed June 1, 1962, between and among the United States of America, American Falls Reservoir District No. 2, and the Big Wood Canal Company.

I have not found a copy of these contracts so hope Carter or legal staff could shed some light.

It appears all people that are complaining are below the Milner Gooding Canal and could be delivered Snake River water. I’m not sure of the timing of the development of the Milner Gooding Canal as it relates to the “Arkoosh vs BWCC” court case and if they are not already being compensated for their decrees by delivery of the AFRD#2 supplemental water.

I will request of Mr. Lakey any water measurement records that may be used to evaluate what the loss may be below Magic Dam and if he has other information from the BWCC about losses in their system.

Maybe we can schedule a phone call next week to discuss this matter further.